No. 14,877

IN THE

United States Court of Appeals

For the Ninth Circuit

HAROLD D. PADDOCK,
Appellant,

vs.

FLORENCE PADDOCK,
Appellee.

On Appeal from the District Court for the District of Alaska, Third Division.

BRIEF OF APPELLEE.

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I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION.

This appeal is being prosecuted by the appellant (defendant in the lower court) from a certain judgment and decree entered by the District Court for the District of Alaska at Anchorage, Alaska, on the 22nd day of December, 1954. Jurisdiction of the District Court is based on Title 48 USCA 101 (53-1-1 ACLA 1949) and according to the provisions of Chapter 5 of Title 56 ACLA 1949, pertaining to actions for divorce. Practice and procedure in the District Court is controlled by the Federal Rules of Civil Procedure.

Jurisdiction of this Court to review the judgment of the District Court is conferred by New Title 28 USC Sections 1291 and 1294 and is governed in procedural matters by the Federal Rules of Civil Procedure.

II.

STATEMENT AS TO PLEADINGS AND PROCEEDINGS AND FACTS.

This action was instituted by the plaintiff, Florence Paddock, (Appellee herein) on July 23, of 1953. The complaint (R 3-5), in brief, alleges residence of plaintiff, that the parties to the action were married on January 14, 1938, that there was an incompatibility of temperament existing between the parties so that it was impossible for them to continue living together as husband and wife in a normal marital relationship and alleged that there was a question of property rights presented to the Court for determination.

Defendant's answer and counterclaim (R 5-7), filed November 20, 1953, admitted the residence of the plaintiff in Alaska, that the parties were married as alleged by the plaintiff, that no children had been born the issue of the marriage and that a question of property rights was presented to the Court for determination. The answer admitted that the parties were incompatible, denied that the plaintiff had attempted to resolve the differences between the parties and denied that plaintiff was without fault. In his counterclaim defendant alleged his residence in the Territory, the marriage of the parties, that no children had been

born the issue of the marriage and that there were conflicting interests between the parties, with reference to property acquired during the marriage, which should be determined by the Court. All of those allegations of the counterclaim were admitted by the plaintiff in her answer to the counterclaim filed November 24 of 1953. (R. 12-13.) The defendant then set out his claim as to the incompatibility of temperament existing between the parties and claimed that the plaintiff had been extravagant and uncooperative "in the recent course of their married life" and that plaintiff had harassed and injured defendant in the conduct of his business and that the plaintiff had been guilty of misconduct with other persons and that the defendant at all times had conducted himself as a reasonable person and was without fault in the matter. (R 7.) These allegations of the counterclaim were denied by the plaintiff in her answer to the counterclaim. In such answer to the counterclaim the plaintiff also alleged that the trouble between the parties arose from the misconduct of the defendant continuing over a period of several years. (R 13.) Each party prayed for a divorce and that the property rights of the parties be adjudged and determined by the Court and for such other and further relief as to the Court might seem just and equitable. (R 5 complaint; R 7 answer and counterclaim; R 13 answer to counterclaim.)

The matter was set for trial for December 22, 1953. Both parties were present in Court, together with their respective attorneys. (R 63.) The Court at that time referred the matter to a master for an accounting between the parties. (R 64.) The master reported and

his report was considered by the Court in arriving at its decision. (R 23, Findings and Conclusions; R 32, decree.)

At the outset of the trial and by stipulation of the parties, plaintiff's exhibit 1, appraisal of property by Gene Silberer of Norene Realtors, plaintiff's exhibit 2, tax assessment valuation of property as of October, 1952, and plaintiff's exhibit 3, financial statement of Paddock Paint and Furniture Store as of December 31, 1952, prepared by Mr. Godchaux, the company auditor, were admitted into evidence. (R 71 as to exhibit 1 and R 72 as to exhibits 2 and 3.) Plaintiff's exhibit 4, a tentative balance sheet and profit and loss statement for Paddock Paint and Furniture Store for the first eleven months of 1953 was admitted into evidence without objection during the course of the trial. (R 144.)[1]

Plaintiff testified at some length concerning the relationship of the parties and the incompatibility of temperament between the parties and concerning the property acquired and held by the parties. Plaintiff was extensively cross-examined concerning the property matters. (R 74 to 117.)

Earl E. Silberer, otherwise known as Gene Silberer, was examined and cross-examined concerning the valu-

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[1]As will appear from the records in the hands of the Court, appellant herein designated the entire original files and records, including all exhibits, as the record on appeal. The certificate of the clerk (R 62) shows that all original papers, including exhibits, were certified and sent to the Court of Appeals. For some reason appellant has not seen fit to include the master's report or the exhibits as part of the printed record.

ations of the home property with relation to the exhibit previously introduced. (R 117 to 123.)

Harold D. Paddock was examined and cross-examined extensively concerning the property owned by him at the commencement of the marriage and the property acquired by the parties after the marriage and as to the work done by the respective parties in furtherance of the business known first as Paddock's Paint Store and subsequently as Paddock's Paint and Furniture Store. (R 124 to 165.) The defense rested its case (R 165) and Mrs. Paddock was called in rebuttal. The Court continued the matter for receipt of the report of the master and authorized defendant to present a brief if he cared to do so. (R 175.)[2]

Defendant released Mr. Kay who had handled the matter through the trial as attorney for the defendant and Mr. Bell became defendant's attorney. On January 26, 1954, Mr. Bell, on behalf of defendant, moved to reopen the case and to set aside all previous orders made. (R 15-16.) This motion was argued to the Court by both parties (R 17) and was denied by the Court on July 28 of 1954. (R 18.)

The Court rendered its written memorandum of opinion in the matter on October 8, 1954 (R 18-22) and entered its Findings of Fact and Conclusions of Law and Decree on the 22nd day of December of 1954. (R 23-36.) Defendant thereupon filed motion for new trial. (R 36-41.)

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[2]Defendant's brief was filed February 2, 1954, and is part of the original record in the hands of the Court but is not included as part of the printed record.

In accordance with the Findings of Fact and Conclusions of Law the decree provided that the business known as Paddock's Paint and Furniture Store, together with the property on which such business was conducted, should be appraised by three appraisers, one selected by plaintiff and one selected by the defendant and one selected by the two other appraisers. Plaintiff selected George R. Jones. Defendant selected his accountant, W. P. Odom, and the two appraisers jointly selected William Renfro of the First National Bank of Anchorage. These appraisers valued the real estate upon which the business had been conducted at a price of $55,000.00 (R 43), as compared with a value of $70,000.00 in the Silberer appraisal (exhibit 1) and $59,350.00 appraisal by the City of Anchorage for tax purposes (exhibit 2). The two appraisers selected by the parties agreed upon the share of the interest of the respective parties in and to the business and the business property according to the Court's decree (R 46; 49), but disagreed as to whether the interest should be determined by the provisions of the decree or by the provisions of the Court's opinion. The appraiser appointed by defendant contended that the interest of the respective parties should be determined according to the terms of the opinion and contended that the opinion differed from the decree and, thereupon, additional oral evidence was taken by the Court concerning the interest of the respective parties in the business and in the business property. (R 56 and R 58.) The two appraisers at that time each presented written statements of their position, in addition to their oral testimony. The statement by Mr. Odom was introduced as de-

fendant's exhibit "Y" and the statement of Mr. Jones was introduced as plaintiff's exhibit "Z".[3]

The position of Mr. Odom, on behalf of the defendant, appears at pages 47 to 50 of the record and a letter from Bell & Sanders, defendant's attorneys, to the Court concerning the Odom report, appears at pages 51 and 52 of the record. A letter from Mr. Odom to defendant's attorneys, Bell & Sanders, concerning the same matter, appears at pages 52 to 54 of the record. The Court entered its oral opinion concerning the various accountings of the two appraisers on March 11, 1955. The minute order concerning the decision is found at page 54 of the record and transcript of the opinion is found at pages 55 to 57 of the record.

On March 15, 1955, the Court denied motion for new trial and a minute order of such denial appears at page 55 of the record. Thereupon, the Court, on the 24th day of June of 1955, entered formal order denying defendant's motion for new trial and finding that the determination of the interests of the respective parties in the business and in the business property reported by Mr. Jones on behalf of the plaintiff was in accordance with the Court's intention in his opinion and ordered that the Findings of Fact and Conclusions of Law and Decree, entered and adopted by the Court on December 22, 1954, carried out the intention of the Court in its opinion and adopted and reaffirmed such Findings of Fact and Conclusions of Law and Decree in the matter. (R 57-59.)

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[3]Defendant's exhibit "Y" is made a part of the printed record. Plaintiff's exhibit "Z" is not made a part of the printed record as such, but is reproduced at pages 41 through 46 of the record.

Defendant then filed a notice of appeal, followed by an amended notice of appeal, found at pages 60 and 61, respectively, of the record and put up supersedeas bond. The defendant has not complied with the Findings and Decree in any respect and has paid nothing to the plaintiff toward support or property settlement, or otherwise, since partial compliance with the Court's order made in open court at the close of the hearing on December 22, 1953 (R 175), except that defendant for a period of time continued to pay the utility bills and taxes with reference to the home property occupied by the plaintiff. The defendant, Harold D. Paddock, at all times has been and still is in complete possession of the business and of all the property, with the exception of the home property and the lot next to the home property which is being purchased on contract. Any and all rents of the real properties held by the plaintiff and any and all profits of the business have been retained by the defendant.

III.

QUESTIONS FOR DETERMINATION.

Appellant in this matter has filed 17 points relied upon for reversal. Although the notice of appeal is general, apparently appellant has raised no question concerning the propriety of the granting of a divorce to the plaintiff but has limited his argument to the actions of the Court with reference to the property settlement between the parties and with reference to

the allowances made to the plaintiff by the Court by way of temporary support money and by way of a salary for the year 1953.

Appellant's objections are based on the claims that the Court erred in entering any Findings of Fact and Conclusions of Law and in rendering its decree because it is claimed that such actions by the Court were premature. This contention is based (1) upon the contention that appellant, as defendant, had not closed his case and that the Court should have allowed appellant to reopen his case to present further evidence in certain respects. (2) Upon the ground that the Court, in making the division of the property, made its Findings on the basis of insufficient evidence to support such Findings and that the property division was inequitable, unfair and contrary to good conscience. This latter contention is based on appellant's claim that the Court treated the business operated by the parties prior to their separation as a partnership, whereas, appellant claims that the business and the property all belong to him as an individual and that he was entitled upon dissolution of the marriage to all of the property acquired both before and after the marriage.

Appellee believes that all of the objections made by appellant can and should be determined on four questions as follows:

1. Were the Findings of Fact and Conclusions of Law and the Decree entered by the Court premature?

2. Did the Court err in refusing to allow defendant to reopen his case on motion made more than a month after the close of the trial?

3. Did the Court err in the division ordered of the property of the parties?

4. Did the Court err in allowing a salary to the plaintiff for the year 1953 and in allowing support to the plaintiff for the first ten months of the year 1954?

IV.

SUMMARY OF ARGUMENT.

Appellant has based his argument on a false premise as to the record on his claim that he had not rested his case and that, accordingly, the Findings and Conclusions and Decree of the Court were premature. The record shows appellant had rested his case.

Appellant, inferentially at least, claims the Court should have granted his motion to reopen the case to accept additional evidence. Appellant made no showing as to how he expected to prove the additional matter and gave no reason as to why the additional evidence was not offered at the trial and offered nothing at all to show that the additional evidence would be material or helpful to the Court. Appellant made his motion to reopen to the trial Court prior to the ruling of the Court. The motion was argued to the trial Court and was overruled by the trial Court. Granting or denying the motion was in the discretion of the trial Court. Appellant has not claimed or shown any abuse of discretion by the trial Court in overruling such motion. In the absence of a showing of abuse of discretion this Court will not review the action of the trial Court as to the motion.

The claim of appellant that the Court decided this case on a theory of partnership is not sustained by the evidence. Partnership was not pleaded or proved and the Court made no findings or conclusions pertaining to a partnership and the decree made no reference to a partnership or judgment concerning a partnership. The trial Court by law was required to settle the property rights of the parties and that he did acting within the bounds of legal discretion and according to the evidence before the Court.

The testimony as to the efforts of the respective parties in the business operated by them and as to the investment of appellant in the business prior to marriage was disputed. The Court made findings on those points. The findings are supported by substantial evidence. They will not be set aside on appeal unless clearly erroneous. No showing has been made that the findings were clearly erroneous or erroneous at all. Under the Court Rules the Appellate Court will give the findings of the lower Court the benefit of a presumption of validity and the burden is upon appellant to show that such findings were clearly erroneous.

The Court did not err in granting to plaintiff $700.00 per month for 1953. Whether it be called wages or support makes no difference. Appellant kept the books. He charged everything conceivable against the drawing account of appellee but charged only a nominal amount against his own drawing account. All of appellant's normal living expenses for 1953, except his food, were charged against the business and not against his drawing account. Since the Court allowed

appellant a salary of $700.00 a month, appellant profited by the difference between his drawings and $8,400.00, while actually getting his living out of the business. Appellant has no just complaint as to the allowance made.

Appellant has shown no error in the temporary support of $500.00 per month allowed appellee for the first ten months of 1954. Admittedly the allowance was in the power and discretion of the Court. No abuse of discretion has been shown.

On the whole record it appears that the Court tried to divide the property accumulated by the parties equally between the parties, giving appellant the benefit of what he had before the marriage. On the entire record the division was fair and equitable and according to law.

The trial Court speaks through its findings of fact and conclusions of law and decree. The opinion of the Court cannot be used to modify or control the findings of fact and conclusions of law and decree if there is a conflict between the opinion and the formal findings and conclusions and decree. In this case the Court at the request of appellant took additional evidence, both oral and documentary, and specifically found that the Findings of Fact and Conclusions of Law incorporated its intent expressed in the opinion.

V.

ARGUMENT.

Appellee believes that all of the questions for determination here, as previously set forth, must be answered in the negative and that it will be demonstrated conclusively that the District Court for the District of Alaska committed no error with reference to this cause and that the decree of such court should be affirmed by this Court.

At the outset appellee thinks it would be wise to point out several general propositions as it appears clear to attorneys for the appellee that appellant has based a large portion of his argument on premises not supported by the record and on a claim that the trial Court was acting under a misapprehension of the law when, in fact, the record shows conclusively that the Court was not so acting. While it will be necessary to answer appellant's various contentions in some detail as to each of his arguments it seems to appellee's attorneys that a certain amount of confusion may be avoided by pointing out the false premises under which appellee believes appellant is proceeding prior to answering appellant's arguments in more detail.

Section A of appellant's argument is based upon the premise that defendant had not rested his case and that the Court should have allowed him to reopen his case to put in certain additional evidence and that therefore the Findings of Fact and Conclusions of Law and Decree were premature. This contention seems to be based on the theory that at the close of the evidence Mr. Kay, as attorney for the defendant (ap-

pellant herein) was to file a certain brief which he did not file, that before the brief was presented defendant moved to reopen the case, that such motion was denied and that the Court erred in not allowing appellant to present additional evidence.

At the close of the trial on December 22 of 1953, the defendant did rest his case. (R 165.) It is true that Mr. Kay, as defendant's atterney, during the course of the trial, had suggested that he desired to submit a memorandum on the point of whether or not a husband and wife could enter into a technical legal partnership (R 104) and the Court at the close of the proceedings on December 22, 1953, allowed Mr. Kay to and including the 5th day of January 1954 to file his proposed brief. (R 176.) The matter was not held open for additional evidence. Any desire of the defendant to present further testimony was an afterthought.

As to any claim that the Findings of Fact, Conclusions of Law and Decree were premature it should be noted that the motion to reopen the case was filed in January of 1954. (R 16.) It was argued by respective counsel on June 25, 1954 (R 17) and was overruled by the Court on July 28, 1954. (R 18.) The Court's opinion on the case was filed on October 8, 1954, and the Findings and Conclusions and Decree were not signed or entered until December 22, 1954, nearly five months after the order denying motion to reopen the case.

A large portion of appellant's brief, particularly Section B, is devoted to the proposition that a husband and wife cannot enter into a technical business part-

nership and that the Court handled the matter as a partnership and that therefore the Court committed error. With reference to this matter appellee calls attention of the Court to the fact that the pleadings do not allege a partnership and that there is no evidence at all that the parties ever had or ever thought they had a technical partnership and that the Court did not treat the matter as a partnership. The whole theory of appellant concerning this partnership proposition apparently arises from statements made by Mr. Davis, one of appellee's attorneys, in his opening statement to the Court at the time of the trial on December 22, 1953, (R 66) wherein Mr. Davis, after stating that a considerable portion of the property consisted of a going business which could not be divided without serious detriment to both parties stated that the Court must so arrange the property settlement that the business would go to one or the other of the parties as a going business. With reference to that matter (R 67) Mr. Davis stated that, although the parties had conducted the business as a partnership for many years, that Mrs. Paddock had been excluded from the business premises. Mr. Kay then in his opening statement to the Court stated that he believed the evidence would show that the business had never been conducted as a partnership, had never been a partnership and was not at that time a partnership. (R 68.) On questioning Mrs. Paddock, Mr. Davis asked her if the business had been conducted as a partnership. Mr. Kay objected and the Court sustained the objection. (R 83.) The question wasn't answered. Appellee made no claim that the business was in fact a technical partner-

ship. There is evidence that the business was conducted as a partnership would have been conducted. Among other things, it appears from the evidence that the business books were set up to show a drawing account on behalf of the two parties. Actually, as will appear from the entire record, plaintiff's claim was that she, as a wife, and particularly as a wife who had worked in the business and who had helped develop the business, was entitled to one-half interest in the property acquired by the parties, whereas, appellant claimed that all the property was in his name and that, therefore, the wife had no interest in it.

At page 103 of the record the Court sets forth its theory of the relationship between the parties where it stated that the Court considers marriage as a partnership and on page 105 of the record the Court distinguishes between a legal and technical partnership and the rights of the parties to a divorce proceeding. At that point Mr. Kay indicated that he recognized that the rights of the parties on a divorce proceeding are exactly what the Court feels is right and that the Court has almost complete discretion in the matter and that whether a business was conducted as a partnership or as to whether it wasn't would not affect whatever decision the Court might decide to make in a division of the property. Mr. Kay was undoubtedly referring to the provisions of 56-5-13 ACLA 1949, subsection Sixth, governing division of property on divorce actions which reads as follows:

> "Sixth. For the division between the parties of their joint property, or the separate property of each, in such manner as may be just, and with-

> out regard as to which of the parties is the owner of such property; and to accomplish this end the judgment may require one of the parties to assign, deliver or convey any of his or her real or personal property to the other party; and the provisions of section 55-10-7 of the Compiled Laws of Alaska 1949 shall apply to any such judgment."

There was never any finding by the Court, oral or otherwise, that there was a partnership between the parties. The Court in its decree attempted to divide the property equally between the parties.

In several parts of his argument, particularly in Section C thereof, appellant contends that the opinion of the Court differed from the Findings of Fact and Conclusions of Law and the Decree signed by the Court and that, therefore, the Court must have entered its Findings of Fact and Conclusions of Law by inadvertence and mistake. Whether there is any conflict between the opinion of the Court and the Findings of Fact and Conclusions of Law and the Decree signed by the Court is certainly debatable, but in any event the Court made formal Findings of Fact and Conclusions of Law and appellee believes that such formal acts of the Court are the action of the Court. Insofar as the opinion may be inconsistent with the Findings of Fact and Conclusions of Law and Decree entered, the opinion means nothing. However, in this case, the specific point made by appellant here was called to the Court's attention and argued at length and additional evidence was taken by the Court and the Court, after considering such additional evidence,

made an order in which it specifically found that the Findings of Fact and Conclusions of Law and the Decree theretofore signed and filed by the Court were in accordance with what the Court had intended in its opinion and at that time reaffirmed the Findings of Fact and Conclusions of Law and Decree theretofore adopted. On this record it seems incredible that appellant at this time could claim that the Findings of Fact and Conclusions of Law were evidently signed by inadvertence and mistake.

Appellee will now attempt in some detail to answer the arguments made by appellant in their order.

Section A of appellant's argument embraces points 1 and 2 of appellant's points relied upon for reversal. Appellant claims that he had not rested his case because there was an understanding that Mr. Kay would present a brief on certain issues of law and that appellant's attorney, Mr. Bell, filed a motion to reopen the case and to set aside all orders previously made and that the motion was erroneously overruled.

As previously pointed out by appellee, plaintiff did close his case as the record conclusively shows. Did the Court commit error in refusing to reopen the case at the request of appellant? 3 Am. Jur., Appeal and Error, section 971, has to do with the conduct of a trial and uses the following language:

> "The mode of conducting the trial is left almost entirely to the discretion of the trial judge and will not be reviewed by an appellate court in the absence of an abuse of discretion." (note 17 on page 531, and cases there cited.)

The same work, beginning at the bottom of page 532, under the heading "Order and Terms of Introducing Evidence", uses the following language:

> "The order and times of introducing evidence or proof are matters resting in the sound discretion of the trial court and hence will not be reviewed in the absence of an abuse of such discretion. . . . The reopening of a case to receive additional evidence is also a matter within the discretion of the trial court which will not be interfered with on an appeal except for abuse." (note 18 on page 533, and cases there cited.)

See, *Haveman v. Beulow,* Wash., 1950, 217 P. (2d) 313, 19 A.L.R. (2d) 763, 768, where the Court uses the following language:

> "The reopening of the case after it has been submitted to the court for decision is within the discretion of the court and its action will not be disturbed unless it clearly appears that such discretion has been abused."

See, also, 53 Am. Jur. under the heading "Trial", section 123, page 109, at the bottom of the page where the following language appears:

> "Likewise, the trial court may, in its discretion, decline to reopen the case, and its action will not be disturbed unless there has been an abuse of discretion. . . ." (notes 17 and 18, and cases there cited, including among other cases, *Silkey v. Tiegs,* Ida., 1931, 5 P. (2d) 1049 and *Denman v. Brennamen, et al.,* Okla., 1915, 149 P. 1105.)

In the case of *Horicon v. Langlois's Estate,* Vt., 1949, 66 Atl. (2d) 16, 9 A.L.R. (2d) 195, headnote 7,

page 201, the Court states that a ruling lying in the discretion of the trial Court will, the contrary not appearing by the record, be presumed to have been made in the exercise of discretion.

Appellant here has not attempted to show any abuse of discretion by the Court in failing to reopen the case. He states that in his motion he had offered to produce *"additional evidence"* of appellee's misconduct. As will appear from the record there is no evidence at all of any misconduct on the part of the appellee. Neither is there any showing of any kind as to how or why if the husband had evidence of alleged misconduct of the wife such evidence of alleged misconduct was not presented at the trial of the case. The defendant had pleaded misconduct. Certainly if there had been any misconduct he could and should have shown it at the time of the trial. On the showing made he is not entitled to object because the Court refused to reopen the case to allow him to offer evidence of misconduct. See *Consolidated National Bank v. Pacific Coast SS Company,* Cal., 1892, 30 P. 96, which holds that the trial Court did not abuse its discretion in refusing to reopen the case where no excuse is shown for not having produced the offered evidence at the trial. See, also *In re Wohleber,* Penn., 181 Atl., 474, 101 A.L.R. 829:

> "Where the petition and the affidavit raise no new issues and disclose no testimony which could not have been produced by reasonably diligent inquiry at the time of the hearing, denial of a rehearing for the purpose of presenting additional evidence is not an abuse of discretion."

Appellant also claims that in his motion to reopen the case he offered to show the true value of all the property belonging to defendant. As will appear from the record all of the property was appraised by Mr. Silberer. His appraisement was introduced into evidence without objection as plaintiff's exhibit 1. The defendant specifically agreed that such appraisement fairly valued all of the property with the exception of the family home which Mr. Silberer appraised at $18,500.00 and which appellant claimed was worth in the neighborhood of $25,000.00. (R 69.) Mr. Silberer was questioned at length by appellant's attorney as to the value of the home and indicated that with the furniture the home might be worth an additional $2,000.00 to $2,500.00. (R 122.) Defendant had full opportunity to present any evidence that he desired to present concerning the value of the home, or for that matter the value of any of the other property. Appellee is unable to understand how appellant could claim that the Court erred in not allowing him to introduce additional evidence to show the value of the property.

Appellee also wishes to call the Court's attention to the fact that the appraisal of the store property, more particularly described as Lot 2 and the east one foot of Lot 3 of Block 39, of the Original Townsite of Anchorage, Alaska, and the building located thereon, made by Mr. Silberer and agreed to by appellant as being a fair appraisal for such property, was in the sum of $70,000.00. The appraisers appointed by the Court valued this property for the purpose of

determining the interest of the appellee at $55,000.00. Since by the terms of the Court's order appellant retained this property it appears that he received the advantage of $15,000.00 in purchasing the interest of the appellee in such property. It would seem to appellee that appellant has no right to complain of the action of the Court in not allowing him to put in additional evidence as to the value of the property.

Appellant argues that in his motion to reopen the case he also offered to show that there never was any semblance of partnership between the parties and claimed that this was extremely important since it appeared that the Court based his opinion, at least in part, upon a finding that a partnership existed between appellant and appellee. Appellee has previously pointed out that the partnership question was considered by the Court at the trial of the case and that the Court at that time indicated that he did not consider such question as being of any importance. (R 104-105.) The case was decided strictly on a basis of a property division between husband and wife on divorce of the parties. It was not decided on a partnership theory. Appellant has made no showing as to how any additional evidence concerning partnership, or lack thereof, might have been helpful at all to the Court in deciding this case had the evidence been offered and admitted.

Appellant also claims that in his motion to reopen the case he offered to show that appellee had done little to advance the business and, in fact, had been detrimental to the operation of the store. Appellant

so testified at the trial. (R 133, 140, 151-155.) Appellee fully testified on the matter as well. (R 97-99, 117.) Appellant has shown no reason at all as to how additional evidence would have been helpful in that respect in any manner whatsoever.

In his argument appellant claims that in his motion to reopen the case he offered to show the Court the actual value of the properties that appellant owned prior to his marriage to appellee. Both parties testified at considerable length concerning the properties owned by appellant at the time of the marriage. Appellant testified that at the time of the marriage the net worth of his business was from $10,000.00 to $15,000.00. (R 128.) The lower figure was double the value that plaintiff had estimated as the worth of defendant's business at the time of the marriage. In cross-examination when defendant was asked to break down the claimed net worth of his business at the time of the marriage, he came up with the total figure of approximately $4,000.00. (R 148.) The record discloses that defendant kept books with reference to his business and that such books were available back at least to the year 1938. Plaintiff's counsel asked appellant, at the time of the trial, to produce those books of the business for the years 1937 through 1940, so that the books could be given to Mr. Godchaux, the Master appointed by the Court, with reference to the testimony of defendant as to the value of his business at the time he married the plaintiff early in 1938. (R 149.) The defendant never produced those books. The only reasonable conclusion is that the Court in allow-

ing the defendant $10,000.00 as the value of his business at the time of his marriage was extremely generous to the defendant. There isn't a shred of evidence anywhere that had the case been reopened that any further evidence could or would have been offered concerning the value of Mr. Paddock's business at the time he married the plaintiff.

Appellant, likewise, complains of the fact that had he been allowed to reopen his case he could have shown that the value of property in the Anchorage area had increased generally since the time of the marriage of the parties. This theory was raised at the time of the trial. (R 131.) Mr. Paddock certainly could have introduced evidence on that point had he cared to do so but he offered no evidence to support that proposition. However, as will appear from the testimony, Mr. Paddock owned no real property at the time of the marriage. According to the undisputed testimony he had entered into a contract to purchase the east twenty-five feet of Lot 9 and the west half of Lot 10, all in Block 29 of the Original Townsite of Anchorage, Alaska, sometime in the year 1937, at and for a total price of approximately $6,000.00. (R 126, 127.) This property has been known throughout these proceedings as the Sunshine Market property. (R 126.) Mr. Paddock was asked as to whether he paid cash for the property or paid some down with monthly payments on the balance. He said that he had paid partly cash for it and that he didn't recall how much had been paid down. (R 127.) See (R 80) for testimony of appellee as to the

purchase of this property. The property was substantially paid for and title taken to it after the marriage. The division made by the Court was on the basis of the total value of all property owned by the parties at the time of the divorce. There isn't any evidence at all that the Court in making the division didn't take into consideration any increase in the value of any property owned by appellant at the time of marriage. It appears without dispute that all the other real property now owned by the parties was acquired after the marriage and, accordingly, it is difficult to see how the defendant might have been harmed by the action of the Court in denying the motion to reopen the case for this purpose.

As to Section A of appellant's argument, appellee submits that appellant has not shown any abuse of discretion by the trial Court in failing to reopen appellant's case or that findings and conclusions and decree were premature. Appellant has made no case for reversal of the judgment on either of such grounds.

Section B of appellant's argument is to the effect that the opinion of the Court and the Findings of Fact and Conclusions of Law and the Decree of the Court are based upon the theory of partnership and that in truth there was no partnership and that the property all belonged to Harold D. Paddock before he married the plaintiff and continued to belong to him after the marriage and that the oral finding of the Court that there was a partnership between the parties is not supported by the evidence, is against

the clear weight of the evidence and is against the laws of the Territory of Alaska.

Appellant starts out his argument by the statement "that the Court seems to have treated this matter as a partnership accounting appears quite evident from the Court's statement at page 103 of the transcript". As a matter of fact, the Court's statement was exactly to the contrary. Mr. Kay, appellant's attorney, recognized that the Court had complete discretion in dividing property between a husband and wife in a divorce action. (R 105.) The Court did no more than to order a division of the property. As previously pointed out, the parties actually conducted the business in the nature of a partnership, but there was no attempt to prove that there was a technical partnership between the husband and wife and the Court did not treat it as a partnership. Accordingly, all discussion of the law of partnership in the matter is completely beside the point and a waste of time. Even if we concede the law to be as claimed by appellant as to a partnership between a husband and wife the fact remains that under the laws of the Territory of Alaska, the Court in a divorce proceeding has not only the right but the duty to divide the property between the parties as to the Court seems justified from the evidence. It doesn't profit appellant any to claim that he actually owned the property or that it was all in his name because the statute specifically provides that the Court shall divide their joint property, or the separate property of each, in such manner as may be just, and without regard as to which of the parties is the owner of the property. (56-5-13, S.S. 6,

ACLA, 1949, above cited.) Certainly that would seem to be as clear as anybody could desire.

The Court had the duty to divide the property whether jointly owned or separately owned in a just manner and in the exercise of a lawful discretion. He did just that on the basis of the evidence presented. Appellant has claimed that the division was unjust and inequitable and oppressive and not based on the evidence but he has cited no instance and quoted no law to indicate that the Court abused its discretion in any way.

It is claimed by appellant in Section C of his argument that the Findings of Fact and Conclusions of Law adopted by the Court conflict with the opinion rendered by the Court and that, therefore, the Findings of Fact and Conclusions of Law were evidently signed by inadvertence and mistake.

Rule 52, Federal Rules of Civil Procedure, requires the Court in a case tried without a jury to find the facts specially and to state separately its Conclusions of Law. The rule further allows the Court, if it desires so to do, to incorporate its Findings of Fact and Conclusions of Law in its opinion. In the case here under consideration the Court entered an opinion which did not purport to include Findings of Fact and Conclusions of Law and subsequently executed and filed formal Findings of Fact and Conclusions of Law.

Barron and Holtzoff, Federal Practice and Procedure, in section 1128, under discussion of Rule 52, beginning at page 827, uses the following language:

> "The trial judge speaks through his findings and judgment. Statements in an opinion which is not regarded or intended as embracing findings of fact and conclusions of law cannot control, modify or impeach the findings or decision."

See *Brooks Brothers v. Brooks Clothing,* Cal., District Court for California, 1945, 5 Federal Rules Decisions, 14, and the other cases cited in note 93 of the work above described. See, also, *Ohlinger v. United States,* decided by this Court in 1955, 219 Fed. (2d) 310; *Stone v. U. S.,* 164 U.S. 380, which states that the Court's opinion cannot eke out, control or modify the Court's findings.

Actually, it is debatable here as to whether there was any inconsistency at all between the opinion of the Court and the Findings of Fact executed by the Court. However, the accountant employed by appellant claimed that there was such inconsistency. Accordingly, at the request of the defendant, the Court took further evidence with reference to this matter and received oral testimony and documentary evidence concerning it. After considering the additional evidence the Court held that the Findings of Fact adopted and filed by it carried out what the Court intended in writing its opinion and by order readopted and reaffirmed the findings previously made. (R 59.) Under these circumstances appellee is unable to understand how the appellant in good conscience can at this date claim that the Court must have entered its findings by inadvertence.

The appellant has not had the evidence taken on this supplemental hearing transcribed and such evi-

dence is not part of the record on appeal. Appellee believes that the burden was on appellant to bring up the record on this point if he desired to raised the point and having failed to have the testimony transcribed and made a part of the record, this Court is entitled to consider that the lower Court acted with good and sufficient reason in reaffirming its previous finding and that appellant has no right to object. See Barron and Holtzoff, Federal Practice and Procedure, section 1131, entitled "Presumptions on Appeal", particularly note 11 and cases therein cited where the following language appears:

> "Consequently, an appellant seeking to overthrow the findings has the burden of presenting a proper record to the Court of Appeals showing that the evidence compelled a finding in his favor."

See *Jernigan v. Southern Pacific Company,* C.A. 9, 1955, 222 Fed. (2d) 245; *McClyman v. Hamilton,* C.A. 9, 1950, 180 Fed. (2d) 965. Appellant here has not shown anything in his argument to the effect that the evidence compelled a finding in his favor.

Section D of appellant's argument is to the effect that the Court erred in finding that both plaintiff and defendant devoted their full time to the development of the business and that each party is entitled to one-half of the real and personal property belonging to the parties and claims that there is no substantial evidence to support the finding and that there is plenty of competent evidence against the finding and that such finding is contrary to the greater weight of the evidence and is not supported by any evidence

and that such findings are contrary to equity and justice.

In arguing such matter appellant states that appellee had two very young children at the time she married appellant and that appellant never adopted the children and was not legally responsible for them. We suppose that that matter stands undisputed but we fail to see how that is material to the discussion of this point. It seems reasonable to suppose that appellant at the time he entered the marriage knew of the existence of the two children and entered the marriage with the understanding that the children would be brought up as his children. Whether he legally adopted them or not has no particular bearing on the case.

Appellant has shown nothing at all as to how it is claimed that there was no substantial evidence that plaintiff and defendant jointly developed the business or as to any of the competent evidence which appellant claims militates against such findings or as to how such findings are contrary to the greater weight of the evidence. It is argued that since appellee had two small children that obviously she would have to spend some time caring for them so that she could not have spent as much time working in the business as the appellant did. As a matter of fact, the appellee testified that she did contribute equally with defendant and that she did spend as much time in the business as appellant did. (R 117.) The testimony of the parties was oral. The testimony as to how much plaintiff worked in the business was disputed. The

Court had not only the right but the duty to weigh the evidence given by the respective parties and this Court, under the provisions of Rule 52, will not set aside any finding made by the trial Court unless clearly erroneous. In arriving at a decision as to whether the finding is clearly erroneously this Court is to give due regard to the opportunity of the trial Court to judge the credibility of the witnesses. See Barron and Holtzoff, Federal Practice and Procedure, section 1131, "Presumptions on Appeal" above cited where the following language appears:

> "On appeal the Appellate Court does not re-try the case. The findings of fact are presumptively correct and will not be set aside unless clearly against the weight of the evidence or based upon an erroneous view of the law. . . . The Appellate Court takes that view of evidence which is most favorable to appellee who prevailed in the trial court. It assumes that all conflicts in the evidence were resolved in favor of the appellee." (Notes 9, 10, 12 and 13 and cases there cited, including several decided by this Court.)

The statement of appellant in his brief that had the appellee stayed at home more and taken care of her two young children this divorce might never have occurred would appear to be pure speculation based on no evidence whatsoever. From the undisputed evidence it appears that the parties got along reasonably well until the children were pretty well grown and the marriage was finally broken up because the defendant failed to stay at home and went his own way without regard at all for the plaintiff. He finally

moved into an apartment of his own, leaving the family home. (R 75, 76, 77, 78, 79.) The evidence shows conclusively that plaintiff did work in the store operated by the family from the time of her marriage up until the month of April of 1953, at which time she quit by mutual agreement of the parties because the incompatibility between the parties was such that they could not be together at the same place without creating an impossible situation. Appellant has shown nothing here to justify this Court in holding that the finding of the trial court was clearly erroneous.

With reference to the last paragraph of that portion of appellant's argument which is denominated "D", appellee believes that the matter has previously been covered. Actually by provisions of the law the Court has discretion to award the separate property of one party to the other party or to divide such separate property. As has previously been shown there actually wasn't any separate property at all.

Section E of appellant's brief is to the effect that the Court erred in finding that the value of defendant's investment in the business prior to the time of the marriage was $10,000.00, and that the finding should have been to the effect that the defendant owned two specific pieces of property at the time of the marriage and such argument claims that all of the evidence shows that fact to be true.

So far as the property is concerned appellee in her argument has already dealt with the so-called Sunshine Market property, the east twenty-five feet of Lot 9 and the west half of Lot 10 in Block 29 of the

Original Townsite of the City of Anchorage, Alaska. According to the evidence such property was purchased under contract sometime in the year 1937, but how much was paid down and how much was paid later does not appear. Neither does it appear as to whether the purchase was made in December of 1937, one month prior to the marriage of the parties, or in January of 1937, one year before the marriage of the parties, or at some other time in that year. So far as the other property is concerned, being the property we have called Paddock's Paint and Furniture Store property, described as Lot 2 and the east one foot of Lot 3 of Block 39 of the Original Townsite of Anchorage, Alaska, there is no support at all for the statement of appellant in his brief that "there is no dispute in this case that appellant owned the going paint store in the City of Anchorage, *including the property upon which the buildings were located,* at the time that appellee first went to work for him and that appellant also owned this at the time appellee married the appellant." (B 29.) The parties were married in January of 1938. The property where the business is now conducted and described as Lot 2 and the east one foot of Lot 3 of Block 39, as above described, was purchased in 1942. (R 130.) Appellant had no property at the time of his marriage except the painting business and the undetermined amount that he paid down on the Sunshine Market property. (R 129.)

As to the allowance of $10,000.00 made by the Court to defendant as his investment in the business owned by appellant at the time of the marriage, appellant

testified that the business at the time of the marriage was worth somewhere between $10,000.00 and $15,000.00. (R 128.) As previously mentioned defendant on cross-examination was asked to break down that valuation. The only figures mentioned by appellant as a breakdown of the value of such business totalled no more than $4,000.00 (R 148) and adding to that the paint stock of $2,500.00 claimed by appellant in his direct examination, the total of the figures given by appellant was $6,500.00. This figure incidentally was a figure as to assets without any deductions at all for liabilities and certainly could not have been considered as representing net worth. The plaintiff had testified that she considered defendant's net worth at the time of the marriage did not exceed $5,000.00. Taking the evidence in the light most favorable to the appellee, and giving effect to the presumptions favoring the findings of the trial Court (Barron and Holtzoff, Federal Practice and Procedure, Sec. 1131, page 831), it cannot be said that the findings of the trial Court were clearly erroneous. See, also, Barron and Holtzoff, Federal Practice and Procedure, section 1133, under the heading "Clearly Erroneous" where the following appears at note 19:

> "Findings of fact are not clearly erroneous unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law."

And at note 20:

> "The mere fact that on the same evidence the Appellate Court might have reached a different result does not justify it in setting the findings

aside. The Appellate Court does not consider and weigh the evidence de novo."

And at note 21:

"In considering whether trial court's findings are clearly erroneous, appellees must be given the benefit of all favorable inferences which may reasonably be drawn from the evidence."

Lassiter v. Guy F. Atkinson Co., C.A. 9, 1949, 176 Fed. (2d) 984. See, also, *Pacific Portland Cement Co. v. Food Machinery and Chemical Corporation,* C.A. 9, 1950, 178 Fed. (2d) 541 where the Court held that the conclusion reached by the trial Court is not clearly erroneous even if there is evidence in the record from which different conclusions might have been reached.

Appellee maintains that the finding of the Court allowing appellant the sum of $10,000.00 as a credit for the value of his business at the time of the marriage of the parties is amply sustained by the evidence and that such finding is not clearly erroneous.

Appellee will concede that the discretion of the Court in dividing the property between the parties to a divorce action is not absolute and that arbitrary and capricious actions of the Court may be reviewed. Appellant claims that a fair and equitable division of the property between appellant and appellee would not include any division of the property which appellant says was his separate property at the time of the marriage. Certainly that doesn't follow as a matter of law in view of the Alaskan statute above cited. However, as herein shown appellant had no property at the time of the marriage except a paint business

and an undisclosed amount paid toward the purchase of a piece of property purchased at a total price of $6,000.00 and paid out largely, if not almost entirely, after the marriage of the parties. The *Colvin* case cited by appellant on page 32 of his brief differs so radically on its facts from the case with which we are here concerned that it has no validity as authority at all. In the first place, this divorce was not granted to the husband because of the fault of the wife. The divorce was granted to the wife because of the fault of the husband. In the second place, from the record it cannot be disputed that the parties worked jointly from the inception of the marriage until well after the final separation of the parties in acquiring the property which was acquired.

As previously set forth, appellee believes the Court endeavored to divide the property of the parties equally between the parties and appellee believes that such division cannot be said to be an abuse of discretion and erroneous.

In section F of his argument appellant objects to the fact that the Court allowed the plaintiff $700.00 a month in the nature of a salary for the year 1953. Appellant claims that there is no evidence to show that appellee worked in the store in 1953. As a matter of fact, the evidence stands undisputed that appellee worked in the store for the first three months of 1953 and then left the store by mutual agreement of the parties as the parties were not able to get along at the store. (R 91.) However, appellee believes that it is immaterial as to whether the Court calls the

money allowed a salary or whether it calls it support which the Court admittedly could have ordered the appellant to pay to the appellee. The record stands undisputed that appellee on the scale of living to which she was accustomed during the marriage of the parties required at least $1,000.00 a month as living expenses, or required the sum of $750.00 a month over and above the wages she was earning at the time of the trial. It also stands undisputed that appellee was drawing the sum of $1,000.00 per month from the business up until the filing of the divorce action and that thereafter the defendant paid to her the sum of $1,000.00 the first month and cut it to $600.00 the second month and later cut it to $500.00 and later started taking the expenses of operating the house, including fuel and utilities, out of the payments made. The sum of $1,000.00 above mentioned had been in addition to the utilities and taxes on the family home which were paid out of the business. (R 92.)

As will appear from the record, although the tabulation is not in the record, appellee actually drew something over $16,0000.00 in the year 1953, including taxes, utilities, cash payments and a charge back to the plaintiff of the value of an automobile traded in by her. Certainly there couldn't be any objection to the Court allowing plaintiff the sum of $700.00 per month toward her support even if, as contended by appellant, the Court could not allow salary, which contention is specifically denied by appellee.

Also, as will appear from the record, the sum of $700.00 per month was debited against the drawings

charged to the plaintiff, and the defendant was credited with $700.00 per month against which were charged the drawings charged against him. The record of these drawings was kept by the defendant and it appears without dispute that all of defendant's living expenses, except his eating expenses, were charged against the business. Defendant lived in an apartment owned by the business. He took his trips at business expense. His fuel and his utilities were paid by the business. He used an automobile owned by the business and charged the expense of operating and repairing such automobile to the business. None of these items were charged against defendant in the drawing accounts maintained by the defendant. (R 155 to 156.) All in all it would appear that appellant has no reasonable right to complain of the allowance made to the plaintiff of $700.00 per month for the year 1953. Certainly there is no showing at all that the finding of the trial Court is clearly erroneous.

Section G of appellant's argument is to the effect that the Court erred in signing the Findings of Fact and Conclusions of Law and Decree prior to the report of the appraisers. Appellee will agree that the appraisers did not report prior to the signing of the Findings of Fact and Conclusions of Law. In fact, the Findings of Fact and Conclusions of Law and Decree provided for the appointment of the appraisers. The report was made under the terms of the Findings of Fact and Conclusions of Law and Decree. Neither the Findings of Fact nor the Conclusions of Law nor the Decree either directed or authorized the three appraisers to appraise the value

of the defendant's business at the time of the marriage. The Court had already determined that matter. (R 27, 33.) Likewise, the Master's report was made long before the signing of the Findings of Fact and Conclusions of Law and the Decree.

The Court did not refer to the Master any question as to the value of defendant's property at the time of the marriage. Counsel for plaintiff invited defendant to make his books kept at the time of the marriage available to the Master but defendant did not see fit to do so. The only reasonable inference which can be drawn is that defendant was satisfied with the testimony given on the point at the trial or possibly that defendant knew the books, if produced, would be less favorable to him than the testimony.

It doesn't appear that appellant in section G of his argument has stated anything at all which would tend to show that the action of the Court in signing the Findings of Fact and Conclusions of Law and Decree was erroneous in any respect whatsoever.

In paragraph H of his argument, appellant objects to the fact that the Court allowed to the plaintiff the sum of $500.00 per month for temporary support from January 1, 1954, until October 31, 1954. Apparently, appellant concedes that the Court had the power to award temporary support to the plaintiff, but claims that in view of the amount of property awarded to the plaintiff that plaintiff should not have received any temporary support. The record will disclose that plaintiff asked for temporary support prior to the trial and that the Court considered the matter

at the end of the trial on December 22, 1953. Appellant has shown nothing at all as to how it is claimed that the Court erred in making the finding that plaintiff was entitled to receive from defendant $500.00 per month for the first ten months of 1954. In any event no showing has been made of any error in that respect.

With reference to the citation from 26 *Am. Jur.* found on page 35 of appellant's brief, it should suffice to say that, although the citation states a perfectly valid proposition of law where the facts justify it, it has no application in this case where the evidence is undisputed that the parties separated by reason of the fault of the husband.

Appellee has already answered at some length the arguments contained in sections I and J of appellant's brief with reference to the claimed errors in Findings of Fact numbered seven and eight and Conclusion of Law numbered five. They do not require any attention at this point, except to state that it doesn't follow as a matter of course that the property belonged to appellant because it stood in his name. Appellant hasn't shown a single fact to support his contention that the property division ordered by the Court was inequitable.

VI.

CONCLUSION.

In conclusion, appellant here has made many arguments to the effect that the Findings of Fact and Con-

clusions of Law and Decree rendered by the trial Court were inequitable and unfair and not based on the evidence, but appellant has failed to show a single instance in which the Findings of Fact and Conclusions of Law and Decree were not strictly in accordance with law and were not based upon the evidence or were inequitable in any respect. The parties had been unable to reach an amicable property settlement and it became the duty of the Court to settle the property rights of the parties. The Court settled those property rights by coming as near as was practically possible to dividing the property equally between the parties. As pointed out in the argument if either party was favored in the division made it was the appellant. While it seems to be the contention of the appellant that any division of the property which gave the plaintiff anything at all was inequitable, it seems to appellee that on all of the evidence and under the laws of the Territory of Alaska, the division made by the Court was entirely fair to both parties and for that reason appellee respectfully submits that the action of the lower court should be affirmed.

Dated, Anchorage, Alaska,
July 31, 1956.

Respectfully submitted,
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